EARLY MODES OF *IJTIHĀD*: *RA'Y*, *QIYĀS* AND *ISTIḤSĀN*

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The most fundamental source of law in the early phase was the Qur'ān—as elaborated, exemplified and interpreted by the *Sunnah*. Thus, the Qur'ān-*Sunnah* constituted one source of law. The society in which the Qur'ān was revealed, was naturally to develop further by the outward expansion of Islam. Most of the problems that confronted the Muslims living in the time of Revelation were bound to differ from those of the coming generations in the wake of the interplay of Islam and other neighbouring cultures with which they came in contact. As such, the law furnished by the Qur'ān-*Sunnah* source in the time of the Prophet had to be supplemented and sometimes reinterpreted in respect of certain new problems in order to find answers for them. Islamic law, therefore, developed with the emergence of new problems from time to time since the days of the Prophet, and was created and recreated, interpreted and reinterpreted in accordance with the varying circumstances. The process of rethinking and reinterpreting the law independently is known as *Ijtihād*. In the early period, *Ra'y* (considered opinion) was the basic instrument of *Ijtihād*. It was a generic term which preceded the growth of law under more systematic principles of *Qiyās* and *Istiḥsān*, but this term continued to be applied even to *Qiyās* by the rightmost wing.

The term *Ijtihād* in the early period was used in a narrower and more specialized sense than it came to be used in the writings of al-Shāfi'ī and later on. It conveyed the meaning of fair discretionary judgement or expert's opinion. There is a report about 'Umar b. al-Khaṭṭāb that one day he announced to end the fast during the month of Ramaḍān when the sun apparently set. After a while he was informed that the sun was again seen in the sky (as it had not actually set). Upon this he reportedly remarked: "The matter is easy; we exercised *Ijtihād* (*qad ijtahadnā*)." [1] This is an early example of the use of this term by the Companions standing for discretionary judgement.

Among the early authorities we find its frequent use in Mālik. He uses this term generally for the cases where he finds no definite answer from the Prophet or in the agreed practice and, therefore, he leaves the matter on discretion of *Imām* to decide.[2] For instance, in the case of injury to a blind eye and amputation of a paralysed hand Mālik holds no fixed compensation but *ijtihād* (fair estimate).[3] He was asked about giving the reward (*nafal*) from the *ghanīmah* to a soldier prior to its distribution. He replied that there was no known practice except that it depended on the discretion (*ijtihād*) of *Imām* to give *nafal* (reward) after the distribution of *ghanīmah* or before it.[4] In cases where Mālik uses the term *ijtihād*, the 'Irāqīs use the *ḥukūmat 'adl* (fair arbitration).[5] The term *Ijtihād* is not in frequent use in the 'Irāqīs' writings. Ibn al-Nadīm, however, mentions a book entitled *Kitāb Ijtihād al-ra'y* by al-Shaybānī.[6]

I

Literally speaking, *ra'y* means opinion and judgement. But the Arabs had used it for the well-considered opinion and skill in affairs. A person having mental perception and sound judgement was known as *dhu al-ra'y*. The antonym of *dhu al-ra'y* was *mufannad*, a man weak in judgement and unsound in mind. The epithet (*mufannad*) is reported to have been applied to man alone and not to a woman, because, according to the Arabs, she did not possess *ra'y* even in her youth, let alone in her old age.[7] *Ra'y* was also used in the sense of the views of the Khawārij and they were known as *ahl al-ra'y*.[8] The reason for this appears to be that their views departed from those of *ahl al-Sunnah*. From this it follows that *ra'y* had the element of exclusive independent thinking, although it might not be accepted by others. The Qur'ān indicates that the people of Noah had rejected his message because he was followed by the weak and lowly persons immature in judgement (*bādī al-ra'y*).[9]

This implies that intellectual perfection and maturity in judgement had been since long a criterion of greatness. The Qur'ān itself time and again exhorts to deep thinking and meditation over its verses.[10] It justifies the exercise of reason and personal opinion in legal matters. The Prophet himself set examples by accepting the opinion of the Companions in the matters where he was not directed by the Revelation. On the occasion of Badr, to give an instance, the Prophet chose a particular place for the encampment

of the Muslim forces. A Companion, Ḥubāb b. al-Mundhir, asked him whether he had chosen that place on his own judgement (*ra'y*) or on revelation from God. The Prophet replied that he had done so on his own judgement. When the Companion suggested another place the Prophet told him : "You have made a sound suggestion (*laqad asharta bi'l-ra'y*)".[11] Examples are abundant where the Prophet consulted the Companions and accepted their opinions. The Qur'ān's insistence on consulting the Companions in different matters presupposes its approval of the exercise of personal opinion in deciding problems.

Matters were not much complicated during the lifetime of the Prophet because his decision was the last word. But after his death problems grew more and more intricate. The reason is that the Companions had two bases for deciding fresh cases, namely, the Qur'ān and the precedents left by the Prophet. As regards the Qur'ān, it may be stated that *Ra'y* was the best method to judge which of the Qur'ānic verse was applicable to a given situation and which was not. The problem of *Ḥadīth* was more delicate than that of the Qur'ān. Firstly, because it required confirmation whether a certain *Ḥadīth* actually came from the Prophet; secondly, whether the Companion rightly understood the meaning of the *Ḥadīth*. In this connection we may refer to the internal criticism of Ibn 'Abbās and 'Ā'ishah on a number of traditions known to the students of *Ḥadīth*. As such even in the presence of the Qur'ānic verses and traditions on a certain problem the employment of *Ra'y* could not be avoided. The reason for this is obvious. The Qur'ānic verses and traditions are to be interpreted by the Muslims in order to be definite whether the verse or the tradition is applicable to a certain situation. Interpretation and application, therefore, presuppose exercise of personal judgement. Hence, since the early days of Islam there has been perpetual conflict between the letter and spirit of law. Thus, it is not correct to say that *Ra'y* was exercised only in the absence of the Qur'ānic verses or traditions on some problem. Al-Shāfi'ī's opponent argues that the difference exists over the problems where no Qur'ānic injunction or *Sunnah* is available. Al-Shāfi'ī replies that difference of opinion exists even on points on which there are implicit rules in the Qur'ān or the *Sunnah*. Thereafter al-Shāfi'ī recounts a number of Qur'ānic verses and traditions in which the Companions and the early jurists differed because of their interpretation.[12]

On going through the cases of *Ijtihād* of several Companions especially of 'Umar, the second Caliph, we find that *Ra'y* was exercised even in the presence of the injunctions in the Qur'ān or the *Sunnah*. The fact was that one Companion singled out one verse or tradition for a situation while another pointed to quite a different verse. We give below a few cases where 'Umar exercised his personal opinion, although instructions on those very points can be taken to have already existed in the texts of the Qur'ān or the *Sunnah*.

It is a well-known fact that 'Umar abolished a share of *zakāh* being given to some Muslims or non-Muslims for conciliation of heart as required by the Qur'ān.[13] The Prophet used to give this share to certain chief persons of the Arabs in order to attract them to embrace Islam or to prevent them from doing harm to the Muslims. This share was given also to the neo-Muslims so that they might remain steadfast in Islam. But 'Umar discarded the order which Abū Bakr had written in his caliphate for the donation of certain lands to some persons on this basis. He argued that the Prophet had given this share to strengthen Islam: but as the conditions changed, this share ceased to be valid.[14] 'Umar's action seems apparently contradictory to the Qur'ān. But, in fact, he considered the situation and followed the spirit of the Qur'ānic injunction. His personal judgement led him to decide that even if the Prophet had lived in similar conditions, he would have done the same. 'Umar b. 'Abd al-'Azīz, during his caliphate, had given this share to a certain person for the same purpose for which the Prophet used to give in his lifetime.[15] Both these examples show how *Ra'y* decided where to apply a Qur'ānic injunction and where not.

Another important illustration for the point in question is 'Umar's decision for not distributing the lands of Iraq and Syria among the Companions. The Muslims insisted on distributing the land among them according to the practice. To all their contentions 'Umar replied that if he kept on distributing the lands, from where would he maintain the army to protect the borders and the newly conquered towns? The Companions, therefore, agreed with him and remarked: "Yours is the correct opinion (*al-ra'y ra'yuka*)". 'Umar later on found the justification of this decision in the Qur'ānic verses LIX: 16-10 which entitled the *Muhājirūn*, the *Anṣār*, and the coming generations to receive the share from

ghanīmah[16]. 'Umar apparently departed from those Qur'ānic verses which contain the injunction of distributing booty among the Muslims. According to the rule and practice, too, the lands should have been distributed like other articles of *ghanīmah*. But 'Umar preferred the general benefit of the Muslims to that of the individuals. Social justice demands that conquered lands should not be distributed among the army. This illustration provides an important example of early *Istiḥsān*, i.e. departure from the established rule in the interest of equity and public welfare.

According to a report, some slaves had stolen a she-camel and slaughtered it. When the matter was referred to 'Umar, he in the first instance ordered the cutting of the hands of the thieves, but after a short while, addressing the master, he said : "I think you might have starved them out". He, therefore, ordered the master of the slaves to pay double the price of the she-camel and withdrew his order for the cutting of hands.[17] Another story runs that a man stole something from *Bayt al-Māl* but 'Umar did not amputate his hand.[18] That 'Umar stopped cutting the hands of thieves during the days of famine is a well-known fact of history. In these cases 'Umar apparently contravened the Qur'ānic verses which contain the injunction of cutting the hands of thieves. But it should be noted that the Qur'ān is silent on the details of the punishment of the amputation of hands. It is for the *Sunnah* or *Ra'y* to decide where to cut the hand and where not.

It is reported that 'Umar imposed a ban on the sale of the mother-of-the-child (*umm al-walad*), or giving her as a gift or in the inheritance. After the death of her master he declared her to be free.[19] On this problem he discontinued the practice rampant during the time of the Prophet and Abū Bakr. Of course, it may be objected that he changed the *Sunnah* of the Prophet and established a new *Sunnah* with his personal opinion. Here it may be remarked that 'Umar was faced with a social situation which was radically different from that of his predecessors. People used to keep slave-girls—who abounded in 'Umar's time because of conquest—with them for some time. Then they fell into the hands of another master with the result that none took the responsibility to look after the children. Moreover, this practice was giving an impetus to the growth of the institution of slavery. The following remarks of 'Umar show how grave the situation had become, and how seriously he was taking this problem. According to *al-Muwaṭṭa'*,

he remarked : "Why is it that people have intercourse with their slave-girls, and why then abandon them to go out freely ? If any slave-girl comes to me and her master confesses cohabitation with her, I shall assign her child to him. Henceforth, either get them free or keep hold of them."[20] From this it follows that this became a problem for him and he was forced to take this stern measure due to the changed social conditions. Similar considerations explain 'Umar's exercising *Ijtihād* in the other cases mentioned above.

These are a few examples where 'Umar apparently departed from the clear injunctions or the previous practice. But it should be noted that this was not the departure but the adherence to the spirit and intention of the text based on his personal judgement.

Let us discuss the question of the relationship of *Ra'y* and *naṣṣ* which seem to be opposed to each other. Literally *naṣṣ* means something clear. Technically it signifies clear injunction which is textually evidenced with regard to certain point in the Qur'ān or *Ḥadīth*. The problem is whether *Ra'y* can be used in taking some decision in the presence of *naṣṣ* on some point. According to the classical theory, there is no room for *Ra'y* in the presence of *naṣṣ*. We have previously pointed out that every command, whether in the Qur'ān or *Ḥadīth*, requires interpretation and its application to the situation. That is why the Companions differed in the interpretation of the Qur'ānic verses. Therefore, we think, there is no escape from the use of *Ra'y* even in the presence of *naṣṣ*. But it is worthy of note that where there is no allowance of any interpretation except in one aspect, the decision will naturally be taken on the basis of *naṣṣ*.

Naṣṣ has been defined in the late literature on jurisprudence as 'the text which conveys only one meaning', or 'whose interpretation is the text itself.'[21] We think that *naṣṣ* by this sort of definition can apply only to a few texts ; otherwise the texts whose different interpretations are not possible are rarely found. It seems that the definition of *naṣṣ*, as stated above, is a development from its meaning. We give below an illustration from al-Shaybānī's *al-Siyar al-Kabīr* which shows that in his time this could be interpreted differently. Discussing the problem of giving protection to enemy he remarks that the protection given by a free Muslim man, whether he be an upright person (*'ādil*) or a profligate (*fāsiq*), will be binding on all Muslims. He justifies this view by quoting a *ḥadīth* from the Prophet which says: "Muslims are

equal in respect of blood and they are like one hand over against all those who are outside the Community. The lowest of them is entitled to give protection on behalf of them." Commenting on the word *adnā* he says that, if it means minor as in the verse LVIII : 7, it is a textual evidence (*tanṣīṣ*) that protection given by one man is valid. Again, if it is a derivative of *dunuww* which means 'nearness', as in the verse LIII : 9, then it would be taken as (textual) evidence for giving protection by a Muslim who resides in the border area, being close to the enemy. Further, he observes that, if it is derived from *danā'ah* which means lowliness, it would be textual evidence (*tanṣīṣ*) for the validity of giving protection by a profligate (*fāsiq*) Muslim.[22]

Al-Shayabānī is the first scholar to use the term *naṣṣ*. Authorities earlier than him have not used this term. Even al-Shaybānī uses this term in *al-Siyar al-Kabīr*[23], which was his last work. The early jurists had generally used the terms *Kitāb* and *Sunnah* instead of *naṣṣ*. Indeed, al-Shāfi'ī uses the term *naṣṣ* in opposition to *Ra'y*, which, we believe, must have developed somewhat prior to al-Shāfi'ī among the circle of the traditionalists but which al-Shāfi'ī adopted as a principle of law. The concept of *naṣṣ* seems to be a reaction against *Ra'y* in al-Shāfi'ī. The more *Ra'y* was discarded and the scope of *Ijtihād* was narrowed, the more the concept of *naṣṣ* dominated and was extended in its application.

The cases to which al-Shāfi'ī applies the principle of *naṣṣ* or are regarded by him as being clear injunction, are not open to reasoning, whether they be in the Qur'ān or in *Ḥadīth*. He himself explains the idea of *naṣṣ* to his opponent. This, too, implies that his opponent, who represents the early schools, is not perfectly conscious of the concept of *naṣṣ* now developing by degrees. Al-Shāfi'ī says that on the emergence of the fresh problems (*nāzilah*) the Qur'ān directs explicitly (*naṣṣan*) or implicitly (*jumlatan*). Further, he remarks that *naṣṣ* means whatever had been ordered or forbidden by God in plain words (*naṣṣan*). Then he gives the cases which fall under *naṣṣ* and *jumlah* respectively. Under *naṣṣ* he mentions the relatives with whom marriage is forbidden, prohibited edibles like blood and pork, and the ritual purity. *Jumlah*, according to him, stands for the duties made obligatory by God like *ṣalāh*, *zakāh*, and *ḥajj*. These duties, he says, were explained and elaborated by the Prophet. Of the cases which he mentions under *naṣṣ* he remarks that the Qur'ān is enough for them and no

further argumentation is needed.[24] This means that al-Shāfi'ī validates the use of *Ra'y* in cases which fall under *jumlah.*

In his *al-Risālah.* al-Shāfi'ī uses the term *naṣṣ* in different forms like *naṣṣ Kitāb*, *naṣṣ ḥukm* and sometimes *naṣṣ al-Kitab wa 'l-Sunnah.* In these different places in the *Risālah* he seems to mean by *naṣṣ* the direct textual evidence whether in the Qur'ān or in the *Sunnah.*[25]

Occasionally he distinguishes *naṣṣ al-Kitāb* from the *Sunnah* in the places where he particularly lays stress on the text of the Qur'ān.[26]

He has written a chapter captioned, "The duties laid down plainly in the text of the Qur'ān (*al-farā'iḍ al-manṣūṣah*), for which the Prophetic *Sunnah* provided details". In this chapter he mentions some verses from the Qur'ān regarding ritual purity and quotes several traditions showing how the Prophet elaborated them. The chapter is followed by another one entitled, "The duty laid down in the text of the Qur'ān (*al-farḍ al-manṣūṣ*) limited and particularized by the *Sunnah*". Al-Shāfi'ī discusses, in this chapter, several problems, namely, heritage, homicide, and usury. From the wordings of the Qur'ānic verses dealt with in this chapter it appears that the injunctions contained in them were of a general nature. But he, by quoting the traditions from the Prophet, explained that they had a specific and limited meaning.[27] This implies that *naṣṣ* requires details, elaboration and amplification. Hence, there can be allowance for the difference of opinion. That is why we find that usury, homicide and heritage are cases subject to legal difference, although al-Shāfi'ī describes them as *manṣūṣ.* Moreover, from the detailed discussion of *naṣṣ* by al-Shāfi'ī we conclude that this problem was more or less new for the early schools and he wanted to acquaint them with it in full details. The theory of *naṣṣ* later on became an instrument for justifying one's own views on some legal problem and for rejecting those of others. Moreover, emphasis on *naṣṣ* closed the door to the use of *Ra'y* in law.

Another problem that confronts us while discussing *Ra'y* is the conflict between the two alleged groups known as *ahl al-Ḥadīth* and *ahl al-Ra'y.* Al-Shāfi'ī mentions the terms *ahl al-Kalām*, *ahl al-Ḥadīth*, and *ahl al-Qiyās* in different places in his writings. By *ahl al-Ḥadīth* he seems to mean the experts on *Ḥadīth*, and not the lawyers of Ḥijāz or those who argued exclusively on the basis of *Ḥadīth* and *ab initio* discarded *Ra'y.* At least until al-Shāfi'ī *Ra'y*

and *Ḥadīth* were intermingled and the law was receiving sustenance from both of them in different centres of legal activity. The group who rejected *Ra'y* and advocated *Ḥadīth* alone was not born as yet. Al-Shāfi'ī was, of course, a great champion of *Ḥadīth* and opponent of arbitrary *Ra'y*: nevertheless, he himself could not escape from the use of *Ra'y* and reason in his argumentation. During this period we hear the names of persons like al-Zuhrī (d. 124 A.H.), Sufyān al-Thawrī (d. 161 A.H.), Sufyān b. 'Uyaynah (d. 198 A.H.), Wakī' b. al-Jarrāḥ (d. 197 A.H.) and others who devoted themselves to *Ḥadīth*. But it would be too much to contend that they wanted to banish *Ra'y* and reason from law. The difference between the views of al-Shāfi'ī and those of his opponents with regard to the qualifications of a *faqīh* is that the former prefers one who adheres most strictly to *Ḥadīth*, while the latter favours the person whose understanding in law is recognized even by the traditionists.[28] This shows that *ahl al-Ḥadīth* and *fuqahā'* during this period had recourse to both *Ra'y* and *Ḥadīth* in their legal reasoning: one giving greater importance to *Ḥadīth* and the other to *Ra'y*.

It seems that *ahl al-Kalām*, according to al-Shāfi'ī, were the Mu'tazilah (and probably also included the Khawārij)[29] who doubted the authenticity of *Ḥadīth*. It appears from his writings that they had different views in this respect. A group of them took only the Qur'ān as a source of law and rejected *Ḥadīth in toto*. Others accepted those traditions which conformed to the Qur'ān and rejected those which contradicted it. A third group accepted the well-known traditions and denied those narrated by a single narrator (*khabar al-wāḥid*). Al-Shāfi'ī has given a brief account of their arguments and his own refutation of them[30]. He occasionally calls them *ahl al-'uqūl* for their emphasis on reason in law. He thinks that they (*ahl al-'uqūl*) are more entitled to base themselves on *Ijtihād* than those who despite having knowledge of *'uṣūl*, like the Qur'ān and the *Sunnah*, still exercise arbitrary *Ra'y* and *Istiḥsān* on the basis of reason.[31]

That in the early period there existed two separate groups: one advocating *Ḥadīth* and the other *Ra'y* does not seem historically true. The reason is that the scholars of *Ḥadīth* in this period were not free from using *Ra'y* in their reasoning and vice versa. Mālik, although a great expert of *Ḥadīth*, frequently uses *Ra'y* in *al-Muwaṭṭa'*. Similarly, the 'Irāqīs who are called *ahl al-Qiyās* by

al-Shāfi'ī are not lacking in *Ḥadīth* as is obvious from their works. *Ra'y* as we learn from al-Shāfi'ī's controversies with his opponents, was equally employed by the lawyers of Ḥijāz and 'Irāq. He, therefore, constantly accuses both schools of the negligence of *Ḥadīth* as compared to *Ra'y*[32]. We find another clue which strengthens our viewpoint. Al-Zuhrī is generally known as a great *muḥaddith* but not noted as a great lawyer. Still it should be noted that al-Shaybānī calls him the greatest lawyer and the scholar of traditions (*riwāyah*) in Medina.[33] This shows that the sharp distinction between *ahl al-Ḥadīth* and *ahl al-Ra'y* did not exist in the early period. Al-Shāfi'ī occasionally uses the term *ahl al-'ilm bi'l-Ḥadīth wa'l-Ra'y*[34] which indicates confluence of *Ḥadīth* and *Ra'y*. The opposition between *Ḥadīth* and *Ra'y* appears to have developed in the post-Shāfi'ī period when the school bias took root in the followers of each school. But it is obvious that the process of separation began at least with al-Shāfi'ī. Medina was already known as 'home of the *Sunnah*' as called by al-Shāfi'ī.[35] The appellations of *ahl al-Ḥadīth* was, therefore, ascribed to the lawyers of Medina and *ahl al-Ra'y* to the lawyers of 'Irāq.

With the movement of the compilation of *Ḥadīth* a number of doctors of *Ḥadīth* came in the field. They narrated *Ḥadīth* in support of every problem, as is obvious from classical collections. Al-Shāfi'ī had already condemned unrestricted *Ra'y* in his time, although he could not part with it practically. In the post-Shāfi'ī period *Ra'y* began to be condemned on the basis of *Ḥadīth*. We find a chapter on "condemnation of *Ra'y* and *Qiyās*" in several collections of *Ḥadīth*. During this period, we believe, *Ra'y* was separated from *Ḥadīth*. This literalist (*ẓāhirī*) attitude of mind towards *Ḥadīth* gave birth to a legal school known as *ahl al-Ẓāhir*. Henceforth the conflict between *Ḥadīth* and *Ra'y* was aggravated. As a result of the acrimony of this conflict the authorities of the early age were shown to have been divided into *ahl al-Ḥadīth* and *ahl al-Ra'y*. Among the 'Irāqīs al-Sha'bī (d. *circa* 103 A.H.) has been represented as an opponent of *Ra'y*. A host of reports has been attributed to him in condemnation of *Ra'y*. But it may be remarked that the early trend of reasoning in law belies the proposition that there had existed scholars who based themselves purely on *Ḥadīth* to the exclusion of *Ra'y*. Moreover, it is curious to note that al-Sha'bī occurs in the *isnād* of a number of reports which contain the decisions taken on the basis of *Ra'y*.[37] Besides,

it is reported that he was appointed to the post of judge during the caliphate of 'Umar b. 'Abd al-'Azīz[38]. How can a judge avoid the use of *Ra'y* ? Therefore, the picture that emerges from the later reports ascribed to him does not seem to be historically true. For similar reasons the name *Rabī'at al-Ra'y* given to Rabī'ah b. Abī 'Abd al-Raḥmān (d. 136 A.H.) of Medina is doubtful. Mālik narrates a number of reports from him in *al-Muwaṭṭa'* but this appellation does not appear there. This, however, requires further investigation.[39]

Ra'y was the basic and natural instrument to solve the legal problems in the early schools. The differences in law between various centres of legal activity and between the lawyers of each school were generally based on *Ra'y*. Ibn al-Muqaffa' portrays a hideous picture of the dissensions among the jurists. The divergence of opinion in law, he says, assumed a chaotic state of affairs. What was held lawful at Ḥīrah was made unlawful at Kūfah. Such differences are evident even in the single town of Kūfah. A certain thing was permitted in one quarter of Kūfah, while the same was forbidden in another. The schools of 'Irāq and Ḥijāz insisted on following what was in the hands of each of them and tried to disparage one another. Even the *Sunnah*, as they called it, was nothing but the personal opinion (*Ra'y*) of some individual, not supported by the Qur'ān and the *Sunnah*[40]. A similar picture emerges in the mind of the reader of the controversies of al-Shāfi'ī with his opponents. Below, we discuss a few problems and show how *Ra'y* was at work in the making of law in different legal centres.

Sa'īd b. al-Musayyib reports that 'Umar b. al-Khaṭṭāb had decided one camel to be enough compensation for injury to a molar tooth, while Mu'āwiyah decided five camels. Commenting on this he says that in 'Umar's decision the compensation decreases but, according to Mu'āwiyah, it increases. If he were to take his decision on this point, he adds, he would have fixed two camels for the injury to a molar tooth, so that the compensation may become equal. Concluding, he remarks that every *mujtahid* is rewarded. It is worthy of note that the opinion of Sa'īd b. al-Musayyib is against the majority stand of the Medinese on this point. They follow the decision of Mu'āwiyah who fixed five camels for a molar tooth. Mālik argues that the Prophet fixed five camels for the injury to a tooth ;[41] and since the molar is also a tooth, its compensation must also be five camels. In this example we note that with

what independence Sa'īd b. al-Musayyib abandons the decisions taken by 'Umar and Mu'āwiyah and gives his own opinion. Of course, Mālik refers to the tradition of the Prophet who fixed five camels for a tooth and not for a molar tooth. Hence he uses his *Ra'y* and follows the same compensation as for a tooth.

In the case of injury to the collar bone or a rib, 'Umar b. al-Khaṭṭāb is said to have fixed one camel as compensation. But the Medinese do not follow this decision and maintain that there is no known compensation for the collar bone or a rib. They hold that any fair compensation (*ḥukūmah bi'l-ijtihād*) can be fixed for these wounds.[42] Al-Shafi'ī bitterly objects to this sort of arbitrary reasoning of the Medinese. He contends that compensations (*diyah*) were fixed by the Prophet through Revelation, and since 'Umar, being a Caliph, takes the place of the Prophet, his decision should not be ignored.[43] In these two cases we observe that they accepted neither Ibn al-Musayyib's opinion nor 'Umar's decision but established their own doctrine. This led al-Shāfi'ī to accuse them of sometimes accepting 'Umar's decision and ignoring *Ḥadīth* from the Prophet, while occasionally doing the opposite. He, therefore, comments categorically that the Medinese take their knowledge arbitrarily.[44]

According to the Medinese, the compensation for the injuries caused to a woman is half of that for the injuries caused to a man, if it amounts to one-third of the full *diyah* (i.e. 100 camels) or more, but the same is equal to that for injuries caused to a man in case it amount to less than one-third of *diyah*.[45] On the basis of this principle Sa'īd b. al-Musayyib held that the compensation for three fingers of a woman is thirty camels, while the compensation for four fingers is only twenty camels. He was questioned how it was that the compensation decreased as the number of wounds increased. He replied that this was the *Sunnah* (i.e. the practice at Medina).[46] Here we note that Sa'īd b. al-Musayyib does not use his *Ra'y* in this problem because it is based on the majority opinion and agreed practice (*Sunnah*). This doctrine is attributed to Zayd b. Thābit. On this point the 'Irāqīs do not agree with the Medinese. According to them, the compensation for the injuries caused to a woman is half of the compensation for the injuries caused to a man irrespective of the extent of *diyah*. Their principle is attributed to 'Umar b. al-Khaṭṭāb, and 'Alī b. Abī Ṭālib.[47] Al-Shāfi'ī compares both these doctrines and remarks that one

opinion may be more correct than the other. It is interesting to see that he calls the principle ascribed to 'Umar, Alī and Zayd b. Thābit *Ra'y*. As regards the *Sunnah* referred to by Ibn al-Musayyib he is doubtful whether this is the *Sunnah* of the Prophet or of the Companions or it is based on *Ra'y*.[48] This example clearly shows how legal doctrines were formulated on the basis of *Ra'y* and how the decisions of the Companions were followed in the light of reason. *Ra'y* was the major factor for the differences in legal doctrines of various schools of law before al-Shāfi'ī.

The Medinese employ their *Ra'y* and reasoning in accepting the traditions of the Prophet. Their treatment of *Ḥadīth* is most objectionable in the eyes of their opponents. They narrate a *Ḥadīth* from the Prophet but do not follow it. We adduce a few examples to show how *Ra'y* was working even in *Ḥadīth* in Medina. Mālik narrates a *ḥadīth* that the Prophet had said his *Ẓuhr* and *'Aṣr* prayers together and similarly he had combined *Maghrib* and *Ishā'* prayers in the absence of any fear of rainfall. Concluding, he remarks: I think (*arā*) it happened on a rainy day.[49] Although the *ḥadīth* clearly mentions that the Prophet combined these prayers without any excuse, Mālik would not allow this except on an excuse such as a rainy day.

The Medinese narrate a *ḥadīth* from the Prophet and the practice of the four Caliphs that they used to recite long *sūrahs* from the Qur'ān in *Fajr* prayer. But they do not follow these traditions because recitation of the long *sūrahs* would cause hardship.[50]

Al-Shāfi'ī criticizes the Medinese opponent for his negligence of a *ḥadīth* in favour of raising the hands while performing *rukū'* in prayer. Thereupon the opponent retorts: "What is the reason (*ma'nā*) for raising the hands at the time of performing *rukū'* ?[51]

By quoting these examples we intend to show that Medina, the home of *Sunnah*, was not free from *Ra'y*. Later, we shall show that even the 'Irāqīs criticize this attitude of the Medinese towards *Ḥadīth*. In fact *Ra'y* in Medīna was an essence and sum total of the opinions of the jurisconsults before Mālik which crystallized in the form of the agreed practice of Medina. Hence it cannot be called arbitrary, as al-Shāfi'ī calls it. The fact that Mālik narrates a *ḥadīth* even when he does not follow it, is the greatest proof for the *Ḥadīth-Ra'y* complex in the scholars of that period. As an expert in *Ḥadīth* he narrates a tradition, but as a jurist he either

follows or neglects it.

The 'Irāqīs are at least on a par with the Medinese in respect of using *Ra'y* in legal problems. Al-Shāfi'ī calls them *ahl al-Qiyās* for their frequent exercise of *Ra'y* and *Qiyās* in reasoning. At times they examined a *ḥadīth* on the basis of reason. The interpretation of the *ḥadīth* of *muṣarrāt* is a stock example of their rationality in law. The Prophet is reported to have said: "Do not retain milk in the udders of a camel or a goat to make the yield appear greater. If anyone buys a *muṣarrāt* animal (the animal whose milk was kept held in its udders for some time to show its yield greater) he has the choice, after having milked it, either to keep it with him if he likes, or to return it, if he dislikes, together with one *ṣā'* of dates." Abū Ḥanīfah opines that he should return the animal together with the cost of the milk and not one *ṣā'* of dates. Ibn Abī Laylā holds that he should give one *ṣā'* of dates plus the cost of the milk. The reason for this interpretation is that the milk kept held in the udders of the animal may vary in quality and quantity according to the different types of animal. One *ṣā'* of dates prescribed in the *ḥadīth* as a compensation for any quality and quantity of milk cannot reasonably be the cost of the milk. Hence the 'Irāqīs opine that the cost of milk should be paid instead of one *ṣā'* of dates. Al-Shāfi'ī follows the *ḥadīth* literally and emphasizes unquestioned adherence to the *ḥādīth* of the Prophet.[52]

The problem of giving double share from the *ghanīmāh* to the horse is also disputed among the 'Irāqīs. Abū Ḥanīfah holds that a single share should be given to a soldier and his horse respectively. He argues that 'Umar's governor in Syria did so and it was approved of by 'Umar himself. He does not recognize as authentic the traditions from the Prophet for giving double share. He contends that it is illogical that the share of an animal be greater than that of a Muslim. But Abū Yūsuf and al-Shaybānī are opposed to their master on this problem. Abū Yūsuf argues that the *āthār* and traditions from the Prophet which recommend the double share of the horse are greater in number and more authentic. Besides, he says, the matter has nothing to do with the preference; otherwise a man would be equal to a horse according to Abū Ḥanīfah. Further, he contends that double share is given to the horse so that one may get more equipment than the other. This would encourage people to keep horses for the sake of *Jihād*. Again, the share of the horse is returned to his master; hence the

rider's share is not less than that of the animal.[53]

Refuting the view of his master, al-Shaybānī contends that there is no question of the animal being superior to man because the double share is given to the rider and not to the animal. The preference here is, in fact, of the rider over foot-soldier. Then he substantiates the three shares to the rider. One, he says, is meant for the maintenance of the horse, another for his fighting on the horseback, and the third for his fighting with his own body.[54] This example shows that the same *ḥadīth* is neglected by Abū Ḥanīfah and recognized by his disciples on the basis of *Ra'y* and reason.

Ḥadīth in 'Irāq, no doubt, was judged on rational grounds. But we find certain exceptions to this general attitude towards *Ḥadīth*. According to the 'Irāqīs, fast during the month of Ramaḍān is not broken by eating and drinking in forgetfulness. Although reason demands that fast should break and be atoned for by another fast, the 'Irāqīs do not hold its atonement on the basis of a *ḥadīth*. On this problem Abū Ḥanīfah is reported to have said : "Were there no traditions available in this matter, I would have decided in favour of atonement by another fast." But it is worthy of note that the Medinese do not accept these traditions. They maintain that the fast should be atoned for by keeping another fast. Commenting on the Medinese view al-Shaybānī remarks that this sort of decision cannot be taken on the basis of *Ra'y*, as the contrary opinion is based on traditions which cannot be rejected. He also refers to the consensus of opinion held on this point by the 'Irāqīs.[55] It may be pointed out that the rules formulated on the basis of *Ḥadīth* or *Ra'y* were also supported by local *Ijmā'*. This local agreement of scholars was a decisive factor in each locality and distinguished one region from another. Hence the scholars of each region polemize against those of others.

The 'Irāqīs, no doubt, are ever apt to argue on the basis of the opinions of the Companions (*āthār*). We notice the same critical and rational attitude towards the opinions of the Companions and the Successors as we have witnessed with regard to the *Ḥadīth* of the Prophet. Al-Shaybānī, for instance, does not hesitate to criticize the opinion of Abu'l-Dardā' on the following problem. Abu'l-Dardā' is reported to have held that the Muslim army is allowed to take food which they found in enemy territory to their homes. Further, according to him, they can eat it and give present out of it so long as they do not sell it. Al-Shaybānī comments on

this opinion by saying that Abu'l-Dardā' treated giving the presents as a necessity like eating. He, therefore, does not accept the Companion's view, because eating is a basic necessity while presents are not. He regards giving presents as misappropriation. He holds this view on the basis of several traditions of the Prophet.[56]

In another case al-Shaybānī rejects the opinions of Sa'īd b. al-Musayyib, al-Ḥasan al-Baṣrī and Ibrāhīm al-Nakha'ī which al-Shāfi'ī adduces in support of his view. To this al-Shaybānī remarks: "The opinion of any one of them is binding neither on me nor on you". Thereafter, al-Shāfi'ī accuses him of the fact that at times he himself follows the opinion of these authorities and falls into error. But al-Shaybānī retorts by saying that their ('Irāqīs') view is based on analogical deduction (*Qiyās*) from the *Sunnah* and reason (*ma'qūl*).[57] These examples show that the opinions of the early authorities were not accepted blindly by the 'Irāqī lawyers. Reason and personal, considered opinions were the instruments for deciding cases. That is why the 'Irāqīs use frequently the phrases *arā* (I think) and *ara'ayta* (do you think ?) in their reasoning. From the above analysis we conclude that the lawyers of 'Irāq and Medina had a similar attitude, with a difference in emphasis, towards *Ra'y* in solving legal problems.

The frequent use of *Ra'y* in law by the early authorities created a state of chaos in different regions. Had it continued, Islamic law would have never reached any state of unity. This diversity called for some mainstay to eliminate these dissensions and to forge a basic unity in law. This was done through *Ijmā'* about which we shall write at some later time. Ibn al-Muqaffa', having been fed up with the differences in law, suggests another method to bring about unity. He assigns the right of exercising *Ra'y* only to the *Imām*, i.e. the political authority. He maintains that people can make suggestions to the caliph but have no right to act on their personal opinion. This was indeed a reaction against the free interpretation of law by individual lawyers. He rejects the idea of "total law" which, he thinks, would make the religion rigid for the people. Therefore, he appreciates the use of reason and personal opinion in religion. Due to the differences caused by *Ra'y* he occasionally attacks it, but does not want to eliminate its use. He, perhaps, intends to restrict it in order to avoid chaos in law.[58]

II

The generic term *Ra'y*, the most natural mode of reasoning in the early period, was subjected to a number of conditions and limits with a view to arrest its arbitrariness, and to systematize the reasoning. This systematic form of individual reasoning in law came to be known as *Qiyās*.

Prof. Schacht believes that the word *Qiyās* is derived from the Jewish exegetical term *hiqqīsh*, inf. *heqqīsh*, from the Aramaic root *h.q.sh.*, meaning 'to beat together.' Further he remarks that 'this is used : (a) of the juxtaposition of two subjects in the Bible, showing that they are to be treated in the same manner ; (b) of the activity of the interpreter who makes the comparison by the text ; (c) of a conclusion by analogy, based on the occurrence of an essential common feature in the original and in the parallel case.' The third meaning, he adds, in which Hellel uses the term (Palestinian Talmud 6, fol. 33a. 14), is identical with that of *Qiyās*.[59] This view is not acceptable to us for certain reasons. Firstly, the method of philology has its own limitations and shortcomings in discovering the origins and sources of institutions. If one makes a deep and extensive study to explore in different languages and cultures the terms and institutions current in one language and culture, we believe that one can find a large number of such counterparts. But from this it does not necessarily follow that institutions in one culture have been taken from another culture. But in this case even this philological evidence is completely unprobative, since 'to beat together' carries us nowhere. Granted that in its technical use in Hebrew *hiqqīsh* had the same meaning as *Qiyās* in Islamic law, as Prof. Schacht says, yet there is no evidence to show that it was borrowed by the Muslims from there. It requires adequate proof to establish the foreign provenance of the term. Secondly, viewed from the sociological standpoint every community discovers its own principles and institutions according to its needs as it evolves them. It would be erroneous to assume that these institutions are always borrowed from foreign civilizations. Therefore, the correct approach is to maintain that the principles are, in fact, socially conditioned. The doctrine of *Qiyās* must have come into existence as a result of social necessity, although it acquired a theoretical basis later on. Hence, there is no question of borrowing it from anywhere. It is, in fact, a developed form of *Ra'y* that already existed since the very beginning.

Of course, *Qiyās* is a systematic form of *Ra'y* none the less there is a big difference between the two. *Ra'y* has a flexible and dynamic nature. It decides the cases in the light of the spirit, wisdom and justice of Islam. It is a well-considered and balanced opinion of a person who aspires to reach a correct decision. *Ra'y*, in the words of Ibn Qayyim, is a decision which the mind arrives at after thinking, contemplation and genuine search for truth in a case where indications are conflicting.[60] In other words, *Ra'y* stands for the decision that would have been taken, either by Revelation if it were to come down on that occasion, or by the Prophet if he had been there. *Qiyās* is a comparison between two parallels because of their resemblance. This resemblance which is technically known as *'illah* (*Sharī'ah*-value), is not always defined. One may differ in its determination. *Qiyās* indeed is an extension of a precedent. Its scope, therefore, is more limited than that of *Ra'y*. In *Ra'y* we find the emphasis on the actual situation, while in *Qiyās* the emphasis is on abstract analogy, whatever the situation may be. We find in Ibn al-Muqaffa' an example of this limitedness of *Qiyās*. He illustrates it by the following example. Suppose a man consults you as to make a suggestion whether he should speak the truth or tell a lie. You would certainly suggest him that he should speak the truth. Again he asks you whether on every occasion, say, when a person who wants to kill him, should he speak the truth and give the pursuer the trail of the fugitive? Here *Qiyās* demands that he must speak the truth but *Ra'y* suggests to break the law and not to speak the truth but to do what is generally beneficial.[61] This example shows that *Qiyās* fails on many occasions because of its restricted scope. In the early schools, specially in 'Irāq, *Qiyās* was used in a little wider sense keeping itself close to *Ra'y*. But al-Shāfi'ī restricted its scope to the lowest degree. He laid down a number of rules for *Qiyās* and thus brought it nearer to *naṣṣ*.[62] From al-Shāfi'ī onward *Ra'y* gave place to *Qiyās* with the result that *Ra'y* began to be condemned radically and *Qiyās* figured prominently in reasoning.

Qiyās in its early stages was simple and unsophisticated. The logical major and minor premises with the common factor had not yet come into existence. It consisted in quoting a similar precedent or an analogous case. It was not rigid and formal as it appeared in al-Shāfi'ī. In the following paragraphs we shall give some examples to show the character and use of *Qiyās* in the early schools and its

development.

In the Qur'ān or *Sunnah* there was no fixed compensation for the injury caused to a molar tooth. According to a report, Ibn 'Abbās was, therefore, asked about this question. He replied that a molar tooth is as good as other teeth, like fingers whose compensation, notwithstanding their differences of size, is equal.[63] On this point, Ibn 'Abbās no doubt exercised *Qiyās* but it is so simple and natural that we may call it *Ra'y*. With the appraisal of the cases in which the Companions exercised *Iǰtihād* we assume that their reasoning was characterized by *Ra'y* more than *Qiyās*.

The Syrian al-Awzā'ī generally bases himself on the precedents left by the Prophet or the practice of the Muslims. No doubt the word *Ra'y* has not been expressly mentioned in his arguments. However, it is not difficult to see that his choice of the precedents or the Qur'ānic verses in support of his view reflects his exercise of personal opinion. He exercises *Qiyās* in a very simple form. The following example will show its character. Abū Ḥanīfah maintains that if a slave-mother (*umm-walad*) embraces Islam in enemy territory and migrates to the Muslim territory, in case she is not pregnant she can marry if she so desires, and no *'iddah* is binding on her. Abū Ḥanīfah, according to Abū Yūsuf, argues on the basis of a *ḥadīṯh* from the Prophet. But al-Awzā'ī differs from him on this point and remarks that if a woman leaves her country for the sake of God, to protect her religion, her case is parallel to that of the women who migrated to Medina. She cannot marry, he adds, until the expiry of her *'iddah*. He elaborates his argument that some female emigrants had come to the Prophet at Medina while their husbands who were infidels remained at Mecca; then it so happened that some of these husbands became Muslims and rejoined their wives during their (wives') *'iddah* period and the Prophet allowed them to do so.[64] This and similar other examples show that *Qiyās* in the early schools was a presentation of the parallel without any restrictions as imposed later on. These parallels and border-line incidents constituted a major portion of reasoning of the early authorities. The controversies of Abū Ḥanīfah and al-Awzā'ī along with the comments of Abū Yūsuf provide a vivid picture of this sort of *Qiyās*.

The Medinese, too, exercise *Qiyās* in deciding legal cases, but it is not very formal and rigid. Words like *maṯhal*, *ka* (like) and *bimanzilah* are generally used to denote the similarity between the

two parallels. Even a minor resemblance is enough for them to apply *Qiyās* and to derive a rule from it. That is why they are occasionally accused of immaturity and inconsistency in *Qiyās* by al-Shāfi'ī. It should be noted that the word *Qiyās* itself rarely occurs, unlike that of the 'Irāqīs, in their reasoning. We discuss below a few problems to show the trend of the Medinese towards *Qiyās*.

Discussing the problem of cutting the hand of a thief Mālik says that if a labourer or an employee working together with some persons steals their property, his hand will not be amputated. This case is not, he adds, parallel to that of a thief but to an embezzler ; and the hand of an embezzler is not amputated. Further, he gives two more similar illustrations. If a man borrows something and refuses to return it, his hand will not be cut. His case corresponds, he says, to that of a debtor who refuses to pay the debt due on him. The hand of such a debtor who refuses the debt is not amputated. In the third example he observes that, if a thief collects the property in the house in one place but he does not go out of it, his hand will not be amputated according to the agreed practice of Medina. His case is similar to that of a man who keeps wine before him to drink but actually does not drink. No *ḥadd* punishment will be applied on such a criminal. Similarly, if a man simply sits before a woman with the intention of committing adultery, no *ḥadd* punishment will be given to him.[65]

From the above three examples we can easily understand the attitude of the Medinese towards *Qiyās*. It is important to note that cutting of a hand is a punishment prescribed by the Qur'ān for a thief. But Mālik mitigates this punishment in a number of cases on the basis of *Qiyās*. Moreover, the *Qiyās* that Mālik employs in the above examples is not so perfect and mature as can withstand serious objections. The parallels which he presents in support of his view are open to challenge. In several other cases al-Shāfi'ī criticizes the Medinese *Qiyās*, as we have already shown in the article published in an earlier issue of this Journal (Vol. V, No. 3).

According to the Medinese, the minimum cost of the stolen goods for applying *ḥadd* (punishment) is one-fourth of a *dīnār*. This is the basis for the minimum amount of a dower of a woman. Mālik says: "I do not think (*lā arā*) that a woman should be married for a dower less than one-fourth of a *dīnār* : and this is the minimum cost for which the hand is cut.[66] This shows that the minimum

amount of dower according to the Medinese, is based on *Qiyās*. Although this is a problem of *Qiyās*, yet Mālik uses the term *Ra'y* instead of *Qiyās*. This indicates that *Qiyās* was fundamentally *Ra'y* in the Medinese reasoning. The early Medinese, it should be noted, held no fixed amount of dower. Al-Shāfi'ī, therefore, accuses Mālik of having been influenced by Abū Ḥanīfah on this and of his being inconsistent in *Qiyās*[67].

Qiyās with the 'Irāqīs also seems to be a more systematic kind of *Ra'y*. It was no doubt systematic but not so formal and rigid as with al-Shāfi'ī. The difference between the Medinese and the 'Irāqīs' *Qiyās* is that while with the former it emphasized more the generally accepted practice, with the latter it demanded more logical consistency. The 'Irāqīs in order to avoid inconsistency in *Qiyās*, limited as its scope was, devised another method akin to *Ra'y* known as *Istiḥsān*. Of this we shall discuss later.

The 'Irāqīs, no doubt, sought the decision of a large number of cases on the basis of *Qiyās*. It is worthy of note that the term itself which occurs in their reasoning, frequently conveys a sense more general than technical. It means rational ground, and legal rule. Al-Shaybānī in his writings often says: "We part with *Qiyās* and follow *Istiḥsān*, or '*Qiyās* would be.....but we do not follow it.'[68] Let us quote an example to clarify this point. The problem under discussion is whether an article or a slave, found defective after its sale and use by the purchaser, can be returned to the seller or compensated for its defect. Al-Shaybānī holds that if the article is mortgaged or given to some one as a donation, or in case it is a slave-girl, the purchaser had sexual intercourse with her or kissed her, all such acts, according to *Qiyās*, are indications of the purchaser's assent. Hence, the goods or the slave purchased cannot be returned on the plea of defect to the seller.[69] In this example it is evident that *Qiyās* simply means a general rational ground rather than technical *Qiyās* which explicitly involves a *maqīs 'alayh* (original basis).

Let us give some more examples of 'Irāqī *Qiyās*. In a *salam* (prepaid sale) contract, al-Shaybānī says, if the buyer and the seller differ in respect of naming the time-limit—one claims that the time-limit was named, while the other refuses it—the statement of the party who asserts the naming would be accepted (on the basis of *Istiḥsān*), because the party who refuses the naming designs to invalidate the contract. But, according to *Qiyās* (rule), the

statement of the party who refuses should be accepted and the contract be treated as invalid (as no *salam* contract is valid without naming the time-limit).[70]

If a person takes possession of two pieces of cloth with the express right of option that he would buy any of them for ten *dirhams*, he should have one of them for ten *dirhams*. If any of them is lost or becomes defective, by himself or by someone else, he should take the one already lost or become defective, and return the remaining one. In case both are lost, he should pay half the price of each of the two. This sort of transaction, al-Shaybānī remarks, is invalid according to *Qiyās* because he purchased a thing not known and not named. But al-Shaybānī validates it on the basis of *Istiḥsān* only in the transaction of two or three pieces of cloth, provided that the buyer takes the possession and chooses one of them[71].

Al-Shaybānī validates the sale of wine and swine by the protected non-Muslims (*ahl al-dhimmah*), because they are valuable goods according to them. In this case he exercised *Istiḥsān*, he remarks, and abandoned *Qiyās* because of a tradition of 'Umar reported to him on this point.[72] In all these examples the word *Qiyās* has been used in the sense of general rule or rational ground.

We may now discuss a few problems to show the nature of *Qiyās* according to the 'Irāqīs. The problem of *muzāra'ah* (the lease of agricultural land) is disputed among them. Those who allow *musāqāh* (the lease of a plantation of fruit trees) allow *muzāra'ah*, while others who disallow *musāqāh* disallow *muzāra'ah*. Ibn Abī Laylā permits *musāqāh* and for this he bases himself on the contract of *musāqāh* concluded by the Prophet with the Jews of Khaybar. He extends this analogy to the contract of *muzāra'ah*. Abū Ḥanīfah, on the other hand, allows neither *musāqāh* nor *muzāra'ah*. He argues on the basis of the traditions of the Prophet narrated by Rāfi' b. Khadīj and Jābir b. 'Abd Allāh which interdict such contracts. Abū Yūsuf validates *muzāra'ah* on the basis of *Qiyās*. *Muzāra'ah*, according to him, is parallel to *muḍārabah* (sleeping partnership). As the fact of profit and its amount are both unknown in *muḍārabah*, he argues, the same is true of *muzāra'ah*. He follows the tradition of the Prophet relating to the contract of *musāqāh* with the Jews. He believes that the traditions on *musāqāh* are more authentic, greater in number and more familiar than the opposite traditions. It may be remarked that *muzāra'ah*,

according to Abū Yūsuf, is based on *muḍārabah* by analogical extension and *muḍārabah* itself is an analogical deduction from the contract of *musāqāh* of the Prophet. Thus *muzāra'ah* involves double *Qiyās*, or *Qiyās* on the result of *Qiyās*.[73] This sort of example of *Qiyās* in the 'Irāqī school reflects a phenomenon of free use of *Ra'y* in a liberal but systematic manner. Besides, it shows that for *Qiyās* an original basis of precedent was not necessary but it could consist of rational argumentation.

We find cases in 'Irāqīs where their *Qiyās* is too weak and illogical to stand before the criticism of al-Shāfi'ī. Abū Ḥanīfah, according to a report, holds that a female apostate should not be executed. He argues that the Prophet prohibited to kill women in enemy territory. Al-Shāfi'ī criticizes this analogy by saying that the killing of a woman in enemy territory is not parallel to the killing of a female apostate. Further, he adds that the Prophet interdicted the killing of the aged and servants (*ajīr*) in enemy territory. Similarly, Abū Bakr prohibited the killing of monks during a war. If these people, he asks, turn apostates, would they not be killed ? Again, he contends that as a woman is killed in cases of adultery and homicide, likewise she would be killed in case of apostasy.[74] In this problem the *Qiyās* of Abū Ḥanīfah is unreasonable and the objections of al-Shāfi'ī against him seem unanswerable.

Despite the critical attitude of the 'Irāqīs towards *Ḥadīth*, they occasionally accept traditions which are against reason and general principles. An 'Irāqī opponent of al-Shāfi'ī says that no *Qiyās* is valid against a binding tradition (*khabar lāzim*).[75] A burst of laughter (*qahqahah*) in prayer causes the break of both the ablution and the prayer according to the 'Irāqīs. The Medinese hold that only prayer breaks and not the ablution. Al-Shaybānī in this connection remarks that if there were no traditions (*āthār*) on the point in question, *Qiyās* required what the Medinese held. But he adds, there is no extension of analogy in the presence of a tradition (*athar*) and adherence must be shown to the traditions.[76] In this example the Medinese exhibit themselves more rational and critical than the 'Irāqīs who are on a par with al-Shāfi'ī who emphasizes adherence to the tradition. What we wish to point out in this connection, however, is al-Shaybānī's use of the term *Qiyās* which is not used in a technical sense but must mean reason in general.

The Irāqīs, like the Medinese, produce in their arguments the parallels and border-line incidents to support their view. The frequent use of the phrases *alā'tarā* and *ara'ayta*[77] in their writings refers to such cases. This is also use of *Qiyās* in its wider sense. This also shows that *Qiyās* was akin to *Ra'y* in a systematic form.

The 'Irāqī law seems to be more human than the Medinese. This is best illustrated in the cutting of the hands and feet of a thief. Let us give the details of this punishment. If the left hand of a thief is paralysed, his right hand, according to the 'Irāqīs, will not be amputated lest he should be left without a single hand. If his right leg is paralysed, his right hand will not be cut off lest he should be deprived of both hand and foot at one side. If his right leg has no defect and left leg is paralysed, his right hand will be cut off. If he repeats theft, his left paralysed leg will be amputated. If he does so again, he shall be put in prison until he repents. If a man commits theft four times, his both hands and feet will not be amputated according to the 'Irāqīs. Only right hand shall be cut for the first time and left leg for the second time. For the third time he will be put in prison. Abū Yūsuf gives the reason that one hand and foot should be left to enable him for fulfilling human needs.[78] But there is no such consideration according to the Medinese. If a person commits theft four times repeatedly, his both hands and feet shall be amputated by cutting one each time. If he repeats this for the fifth time, he will be put in prison. If a man has no right hand, his left hand, according to them, will be cut off.[79]

With this appraisal of the doctrine of *Qiyās* in the early schools we conclude that *Qiyās* in this phase was under development. It was used in the sense of parallel, precedent, and reason in general, and their concept of *'illah* was much wider than that of the later jurists. That is why it seems to us that the term *'illah* is not met with in their writings. Words like *bimanzilah* (equivalent) and *mithāl* or *mathal* (likeness) were used to indicate the simple nature and wide scope of *Qiyās*. This simple type of *Qiyās* gradually gave way to the strict logical *Qiyās* in al-Shāfi'ī's period. An opponent of al-Shāfi'ī says : "One thing should not be extended to another analogically unless the latter's origin, source, and application, from the beginning to the end, be identical (with the original, so that it becomes convertible into the terms of the original)."[80] The principle of *Qiyās* entered a new phase with al-Shāfi'ī, which we have already

discussed in our last article (*Islamic Studies*, September 1966).

III

Ra'y, in the early period, appeared in another form known as *Istiḥsān*. It was a unique method of exercising personal opinion by setting aside the apparent and strict analogy in the interest of public benefit, justice or kindness. *Istiḥsān* is an 'unreasoned preference' to an established law in a certain situation or a decision based on reasoning rather than on analogical reasoning. A lawyer is sometimes forced to depart from a binding rule for a certain serious consideration. It depends, indeed, on one's legal acumen to distinguish where a rule is applicable and where it should be abandoned. *Istḥisān* is not a whim and arbitrary opinion, but a mode to take a correct decision according to the situation. This term is frequently used by the 'Irāqī jurists in their reasoning. Departure from *Qiyās* and acting in accordance with a given situation was a method not peculiar to the Irāqī jurists. 'Umar's acts of *Iǰtihād*, e.g. stopping the amputation of the hands of thieves during the days of famine, declaring three pronouncements as triple divorce, banning the sale of slave-mother, prohibiting the marriage with the women of *ahl al-Kitāb* in certain cases, and so on, in fact, fall under *Istiḥsān*. The term was not used before the 'Irāqīs, but the concept was in existence there. The circumstances in which 'Umar had taken these decisions required to deviate from an established rule on the grounds of public interest or for a similar other reason.

Who first introduced this term, is disputed. Goldziher opined that Abū Ḥanīfah was the first jurist to have used this term. The concept and the method similar to *Istiḥsān* was available, according to Prof. Schacht, even before Abū Ḥanīfah, as appears from the circumstantial evidence that he adduces. But the term itself, he maintains, was first introduced by Abū Yūsuf.[81] As the works of Abū Ḥanīfah himself on *Fiqh* are not available, it is difficult to comment on the point. Al-Shaybānī, however, attributes *Istiḥsān* in a number of cases to Abū Ḥanīfah.[82] It seems, therefore, credible that Abū Ḥanīfah might have used this term for the first time. Abū Yūsuf, we presume, therefore, must have borrowed the term from him and was not its originator as Prof. Schacht thinks.

The 'Irāqīs do not generally give the reasons for applying the principle of *Istiḥsān*. One, therefore, cannot know for certain the

reasons and expediency involved in their departure from the established rule. An appraisal of their source-material on *Istiḥsān* shows that besides public interest they departed from *Qiyās* even in favour of a certain tradition or a custom prevalent in their region. This does not mean that they preferred the tradition as a tradition or the custom as a custom to *Qiyās*, but that they thought that a certain tradition or a certain custom was more in public interest than *Qiyās*. We illustrate this with some instances of 'Irāqī *Istiḥsān* that will throw light on its nature and working in law.

If an *Imām* (political authority) or a ruler witnesses a man committing theft, or adultery, or drinking wine, he cannot punish that man on this account until the legally valid evidence is established against him. This is on the basis of *Istiḥsān*—a tradition (*aṯar*) reported from Abū Bakr and 'Umar. But *Qiyās* requires that the man should be penalized on the personal witness of the *Imām*.[83] It is remarkable that apart from the tradition the decision taken in the matter is itself reasonable. For, in the absence of the evidence an *Imām* could execute any person, e.g. his enemy, on the authority of his personal witness by charging him with any crime.

Abū Ḥanīfah disapproved of the custom of *ish'ār* (making incision in the flesh of sacrificial animals) on the occasion of *ḥajj* because, according to him, it is a cruel disfiguration of the animal.[84] Al-Sarakhsī explains Abū Ḥanīfah's view saying that he was, in fact, not opposed to *ish'ār* which is based on *Ḥadīṯ* but since people in 'Irāq exceeded in making incisions so acute that the animal sometimes died in the scorching heat of Ḥijāz, and in any case it would attract flies and cause intense trouble to the animal, he disapproved of the custom.[85] This is, in fact, an example of *Istiḥsān* to which Abū Ḥanīfah had recourse in consideration of the local custom of causing intense trouble to the animal.

If an infidel enters Muslim territory under their protection and a Muslim steals his property or cuts his hand, the hand of the Muslim, according to Abū Yūsuf, will not be amputated. He says that his hand should be cut, according to *Qiyās*, but in this case he employs *Istiḥsān* to bring himself in agreement with those who hold this view.[86] This is a strange example of *Istiḥsān* which does not seem to be justified. The reason given by Abū Yūsuf for his departure from the rule is not intelligible. The intention may be, we assume, that he wanted to discourage the entry of foreigners to

Muslim territory so that the society might remain immune from their influence.

The 'Irāqīs occasionally apply the term *Qiyās* to the strict literal sense of the word and call it *Istiḥsān* when they take it in a broader sense. This use of the term *Istiḥsān* is clear from the following illustration. If the inhabitants of a certain town or a fort seek protection from the Muslims and include the town or fort in the agreement, the protection, according to *Qiyās*, will apply to the fort or town alone and not to their contents. But al-Shaybānī holds that on the basis of *Istiḥsān* the protection will cover the fort or town along with their contents, for in its common usage (*'urf*), the term *qal'ah* or *madīnah*, for example, does not simply mean the building, but all its contents.[87]

Sometimes it happens that the end results of *Qiyās* and *Istiḥsān* are the same from the material point of view, but the decision is taken on the basis of *Istiḥsān* to validate a thing which had been declared invalid on the basis of *Qiyās*. Let us give an example. In the transaction of *salam* (prepaid sale) a purchaser stipulates that the goods purchased should be supplied by the seller at the former's home after the stipulated time. This sort of transaction becomes invalid on the basis of *Qiyās* or a *ḥadīth* which prohibits all conditional sales. This decision is based on *Qiyās*. But al-Shaybānī, however, validates this particular form of transaction of *salam* on the basis of *Istiḥsān*. He argues that even if there were no express condition, the seller would have supplied the goods at the purchaser's home. The condition, therefore, is adding nothing more to the transaction than what would have been implied in an unconditional sale, since the seller would have, in any case, supplied the goods at the home of the buyer. Al-Shaybānī, therefore, treats the unconditional sale as *Qiyās* and the conditional sale as *Istiḥsān*.[88] The reason for treating the conditional sale as *Istiḥsān* seems to be that the whole transaction would have become void if it were treated on the basis of *Qiyās*.

If the Muslim army attacks a cellar or a fort of the infidels, and some of them seek protection of their families and property on the express condition that they will open the gate for the Muslims, these people would be given protection, although they did not make a mention of themselves. When the inmates of the cellar or the fort come out and the people who were promised

protection state that so-and-so are their family and property, pointing to the best property and skilful captives, their statemen. should not be accepted according to *Qiyās* (rule), except on producing the evidence of the upright Muslims. But *Qiyās*, al-Shaybānī adds, is not feasible in this situation because they cannot find upright Muslim witnesses to testify their statement before opening the gate of the cellar. Further, he remarks that as the condition of the witness being a male is waived in a case of necessity, i.e. in cases where men cannot get proper (direct) information, similarly the general rules of evidence will be suspended in the present situation for the sake of necessity. Hence the principle of *Istiḥsān* must be applied. On this basis he holds that, if the captives whom they claim to be the members of their family testify their statement, their testimony will be accepted, and they will be given protection along with them.[89] This example shows that even the rules of fundamental nature can be waived in special circumstances for the sake of necessity.

These are a few instances of the 'Irāqī *Istiḥsān* out of many. These examples show the legal acumen and dexterity in law of the 'Irāqīs. From the use of *Istiḥsān* on different occasions by them we understand that it was, in fact, a method to act what the situation and the circumstances required, and *Qiyās* was the name of the established law.

The use of *Istiḥsān* is not peculiar to the 'Irāqīs but we find its traces in the Medinese reasoning too. The reason for its universal use is the frequent exercise of personal opinion by the early schools. Mālik himself does not use the term *Istiḥsān* in *al-Muwaṭṭa'*, but his sporadic remarks show that the concept of *Istiḥsān* was there. For example, he quotes the opinion of two Medinese jurists that if a widow, during her waiting period (*'iddah*), feels pain in her eye, she can anoint it with collyrium or cure it with a medicine which contains perfume. Concluding he remarks : 'When necessity arises, God's religion is lenient'.[90] This implies that he could depart from the binding rule for the purpose of providing ease and leniency, if need be, in some problems. That is why, we think, in case of compensating for Ramaḍān fast, if a man grows aged and infirm, Mālik does not think feeding the poor obligatory. "It is more acceptable to me (*aḥabbu ilayya*)," he says, "to feed the indigent, if he is capable of doing so." [91] There seems no serious difference between the expression *aḥabbu ilayya* (more

acceptable to me) and *astaḥsinu* (I prefer) used by the 'Irāqīs. We, therefore, conclude that the same methodology of preference was at work in law in the early schools.

Ibn Qāsim, a disciple of Mālik, attributes even the term *Istiḥsān* to him. In *al-Mudawwanah* we come across cases where Mālik is reported to have used this term, and his reasoning appears quite similar to that of the 'Irāqīs. Saḥnūn asks Ibn Qāsim whether *kaffārah* (expiation) falls on a man if he hits the abdomen of a pregnant woman and causes abortion. Ibn Qāsim quotes Mālik as follows: According to the Qur'ān, *kaffārah* falls on a free man if he commits unintentional murder, so in the case of abortion I prefer (*astaḥsinu*) to impose *kaffārah* on the criminal.[92] We do not believe that the concept of *Istiḥsān* in Medina was taken from 'Irāq, because the use of *Ra'y* by the Medinese, as we pointed out before, was no less frequent than that by the 'Irāqīs. Therefore, the idea of *Istiḥsān* must have co-existed in both the regions.

We do not find the term *Istiḥsān* in al-Awzā'ī's writings —only fragments of which have reached us—nor do we find cases decided by him by preferring public interest to the established rule. Rather his strict adherence to law is challenged by the 'Irāqīs on the basis of *Istiḥsān*. The following example throws light on this point. The problem under discussion is whether the Muslims can attack the fort of non-Muslims if they stand on its wall and shield themselves by the children of the Muslims. Abū Ḥanīfah holds that the Muslims may attack them aiming at the non-Muslims and not the children. Al-Awzā'ī maintains that the Muslims should not throw arrows at them, but in case any of the non-Muslims comes out he may be attacked. Arguing on the basis of the Qur'ānic verse XLVIII: 25 he comments: How is it possible to attack the infidels when the Muslims do not see them? Abū Yūsuf defending his teacher accuses al-Awzā'ī of misapplication of the Qur'ānic verse. Moreover, he brings forward a parallel that the Prophet prohibited to kill women and children in the battle: yet he invaded the forts and towns of the people of Ṭā'if, Khaybar, and of Banū Qurayẓah and Banū Naḍīr, which contained women, children and aged persons.[93] In this case, no doubt, Abū Yūsuf refutes the argument of al-Awzā'ī on the basis of *Qiyās*—although the parallel does not strictly resemble the point at issue. We, however, think this is a case of *Istiḥsān*, because the life of the children of the Muslims can be put in danger

only when some serious social or religious interest is involved. It is remarkable that al-Awzā'ī does not take it into consideration and follows the rule strictly.

As *Ra'y* was deplored by al-Shāfi'ī, likewise *Istiḥsān* was not immune from his vehement attacks, as we have already discussed in our last article.

NOTES

1. Mālik, *al-Muwaṭṭa'*, Cairo, 1951, I : 303.
2. *Ibid.*, II : 853, 859.
3. *Ibid.*, 858.
4. *Ibid.*, 455-56.
5. Al-Shaybānī, *al-Muwaṭṭa'*, Deoband, n.d., 294.
6. Ibn al-Nadīm, *al-Fihrist*, Cairo, 1348, 288.
7. Ibn Manẓūr, *Lisān al-'Arab* (s.v. رأى).
8. *Ibid.* Cf. Ibn Sa'd, *al-Ṭabaqāt al-Kubrā*, Beirut, 1957, V: 292-93.
9. Qur'ān, XI : 27.
10. Qur'ān, XLVII : 24.
11. Ibn Hishām, *Sīrat al-Nabī*, Cairo, 1329, II : 210-11.
12. Al-Shāfi'ī, *Kitāb al-Umm*, Cairo, 1324, VII : 245.
13. Qur'ān, IX : 60.
14. Al-Jaṣṣāṣ, Abū Bakr al-Rāzī, *Aḥkām al-Qur'ān*, Constantinople, 1335 A.H., III : 123-24.
15. Ibn Sa'd, *op. cit.*, V : 350.
16. Abū Yūsuf, *Kitāb al-Kharāj*, Cairo, 1302, 13-15.
17. Mālik, *op. cit.*, II : 748.
18. Abū Yūsuf, *op. cit.*, 14.
19. Mālik, *op. cit.*, II : 776.
20. *Ibid.*, 742-43.
21. Al-Juwaynī, 'Abd al-Mālik, *al-Waraqāt fi uṣūl al-Fiqh*, in *Majmū' Mutūn Uṣūlīyah*, Damascus, n.d., 32.
22. Al-Shaybānī, *al-Siyar al-Kabīr*, (with commentary by al-Sarakhsī), Cairo, 1957, I : 252-53.
23. *Ibid.*, 170, 253, 306, 328.
24. Al-Shāfi'ī *op. cit.*, VII : 271.
25. Al-Shafi'ī, *al-Risālah*, Cairo, 1321, 5, 7, 16, 50, 66.
26. *Ibid.*, 21, 24, 63. It deserves to note that *naṣṣ* in the late works on jurisprudence has been subdivided into four kinds, namely *'Ibārat al-naṣṣ*, *Ishārat al-naṣṣ*, *Dalālat al-naṣṣ* and *Iqtiḍā' al-naṣṣ*. Further to indicate the clarity of the meaning of the text the late jurists suggested four degrees *Ẓāhir*, *Naṣṣ*, *Mufassar*, and *Muḥkam*. These are not available in al-Shāfi'ī's works. This seems to be the further development in *naṣṣ*.
27. *Ibid.*, 22-24.
28. Al-Shāfi'ī, *K. al-Umm*, *op. cit.*, VII : 256.
29. Ibn Qutaybah calls various theological sects *ahl al-Kalām*. See *Ta'wīl*

Mukhtalif al-Ḥadīth, Cairo, 1326, 2-6f.

30. Al-Shāfi'ī, *Jimā' al-'Ilm*, Cairo, 1940, (ed. Shākir), 13, 28, 46-47.
31. Al-Shāfi'ī, *K. al-Umm, op. cit.*, VII ; 273.
32. *Ibid.*, 187, 221, 231, 240, 242 ; al-Shāfi'ī, *Ikhtilāf al-Ḥadīth*, on the margin of *K. al-Umm*, VII ; 115.
33. Al-Shaybānī, *al-Muwaṭṭa'*, n.d., Deoband, 319 ; Al-Shāfi'ī, *K. al-Umm, op. cit.*, VII : 291.
34. Al-Shāfi'ī, *Ikhtilāf, op. cit.*, 197.
35. Al-Shāfi'ī, *K. al-Umm, op. cit.*, VII : 291.
36. Ibn Sa'd, *op. cit.*, VI : 251. Cf. al-Dārimī, *Sunan*, Cairo, 1349, I : 46, 67f. It is remarkable that Ibn Ḥazm gives a number of reports in favour of *Ra'y* where al-Sha'bī is one of the transmitters of these reports. See Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, Cairo, 1347, VI : 29. The contradiction in these reports makes them doubtful.
37. Abū Yūsuf, *op. cit.*, 25 ; cf. al-Shāfi'ī, *K. al-Umm op. cit.*, VII : 162, 170.
38. Ibn Sa'd, *op. cit.*, VI : 252.
39. In view of the *ḥadīth-ra'y* polemics prevalent towards the end of the first and the early second century of the *Hijrah* we doubt the authenticity of the anti-*ra'y* and pro-*ra'y* reports attributed to al-Shā'bī and others. Similar is the case with the appellation of *Rabī'at al-Ra'y*. But it is important to remark that we do not deny the role played by them in the development of law in Kufah and Medina, whereas Dr. Schacht tried to portray them as legendary which is not acceptable to us. (*The Origins of Muhammadan Jurisprudence*, Oxford, 1959, 24, 230).
40. Ibn al-Muqaffa', *Risālah fi' l-Ṣaḥābah* in *Rasā'il al-Bulaghā'*, Cairo, 1954, 126.
41. Mālik, *op. cit.*, II ; 861-62. Cf. al-Shāfi'ī, *K. al-Umm, op. cit.*, VII : 218.
42. Al-Shāfi'ī, *K. al-Umm, op. cit.*, VII : 218.
43. *Ibid.*
44. *Ibid.*
45. Mālik, *op. cit.*, II : 854.
46. *Ibid.*, 860.
47. Al-Shaybānī, *Kitāb al-Āthār*, Karachi, n.d., (Sa'īdī Press), 257-58 ; cf. al-Shāfi'ī, K. *al-Umm, op. cit.*, VII : 282.
48. Al-Shāfi'ī, *K. al-Umm, op. cit.*, 282.
49. Mālik, *op. cit.*, I : 144.
50. Al-Shāfi'ī, *K. al-Umm, op. cit.*, VII : 192.
51. *Ibid.*, 186, 233.
52. Al-Shāfi'ī, *Ikhtilāf, op. cit.*, 336-42.
53. Abū Yūsuf, K. *al-Kharāj, op. cit*, 11 ; cf. Abū Yūsuf, *al-Radd 'alā Siyar al-Awzā'ī*, Cairo, n.d., 21.
54. Al-Shaybānī, *al-Siyar al-Kabīr*, (with commentary by al-Sarakhsī), Hyderabad, Deccan, 1336, II : 176.
55. Al-Shaybānī, *Kitāb al-Ḥujaj*, MS. p. 104.
56. Al-Shaybānī, *al-Siyar, op. cit.*, II : 260.
57. Al-Shāfi'ī, *K. al-Umm, op. cit.*, VII : 283.
58. Ibn al-Muqaffa', *op. cit.*, 121, 122, 125 and 127.

59. Schacht, *op. cit*,, 99.
60. Ibn Qayyim, *I'lām al-Muwaqqi'īn*, Delhi, 1313, I : 23.
61. Ibn al-Muqaffa', *op. cit.*, 127.
62. See my article on Al-Shāfi'ī's role in the development of Islamic Jurisprudence, published in *Islamic Studies*, September 1966.
63. Mālik, *op. cit.*, II : 862. 'Alī, the fourth Caliph, is reported to have suggested eighty lashes as a punishment for drinking on the basis of the punishment for *qadhf* (accusation of unlawful intercourse) prescribed by the Qur'ān. He argues that when a person drinks he is intoxicated and eventually falls into raving. When he raves he commits slandering. (*Ibid.*, II : 842). This sort of reasoning is more akin to the logical syllogism than to the simple method of *Qiyās*. Its sophisticated structure in that early age puts the report in doubt.
64. Abū Yūsuf, *al-Radd 'alā Siyar al-Awzā'ī*. Cairo, n d., 99-100.
65. Mālik, *op. cit.*, II : 811.
66. *Ibid.*, 528.
67. Al-Shāfi'ī, *K. al-Umm*, *op. cit.*, VII : 207.
68. Al-Shaybānī, *al-Aṣl*, Cairo, 1954, I ; 23, 181, 182, 218, 222.
69. *Ibid.*, 181.
70. *Ibid.*, 23.
71. *Ibid.*, 136.
72. *Ibid.*, 222.
73. Abū Yūsuf, *K. al-Kharāj*, *op. cit.*, 50-51. Cf. Al-Shāfi'ī, *Kitāb al-Umm*, *op. cit.*, VII : 101-102.
74. Al-Shāfi'ī, *K. al-Umm*, *op. cit.*, VII : 147.
75. Al-Shāfi'ī, *Ikhtilāf*, *op. cit.*, 117.
76. Al-Shaybānī, *Kitāb al-Ḥujaj*, MS. p. 46. See also Abū Yūsuf, *Kitāb al-Āthār*, Cairo, 1355, 28.
77. Abū Yūsuf, *al-Radd*, *op. cit.*, 23, 43, 51.
78. Abū Yūsuf, *K. al-Kharāj*, *op. cit.*, 106.
79. Saḥnūn, *al-Mudawwant al-Kubrā*, Cairo, 1323, XVI : 82.
80. Al-Shāfi'ī, *Jimā' al-'Ilm*, *op. cit.*, 50.
81. Schacht, *op. cit.*, 112.
82. Al-Shaybānī, *al-Aṣl*, *op. cit.*, I : 298. See also his *al-Jāmi' al-Ṣaghīr*, Lucknow, 1291, 84.
83. Abū Yūsuf, *K. al-Kharāj*, *op. cit.*, 109.
84. Al-Shāfi'ī, *K. al-Umm*, *op. cit.*, VIII, 134. See also al-Shaybānī, *al-Jāmi'*, *op. cit.*, 31.
85. Al-Sarakhsī, *al-Mabsūṭ*, Cairo, 1324, IV : 138. It is remarkable that Ibn Abī Laylā, Abū Yūsuf and al-Shaybānī recognize this custom on the basis of the traditions of the Prophet.
86. Abū Yūsuf, *K. al-Kharāj*, *op. cit.*, 117.
87. Al-Shaybānī, *al-Siyar al-Kabīr* (with commentary by al-Sarakhsī), Hyderabad, Deccan, 1335, I : 276. For more similar uses of *Istiḥsān* see pp. 208, 209, 219, 279.
88. Al-Shaybānī, *al-Aṣl*, *op. cit.*, I : 27.

89. Al-Shaybānī, *al-Siyar*, *op. cit.*, I : 308-9.
90. Mālik, *op. cit.*, II : 599 ; also I : 302.
91. *Ibid.*, I : 307.
92. Saḥnūn, *al-Mudawwanat al-Kubrā*, *op. cit.*, XVI : 200. See also p. 228.
93. Abū Yūsuf, *al-Radd*, *op. cit.*, 65-68.